

SUPPLEMENTAL BASIS STATEMENT

CHAPTER 157 CO2 BUDGET TRADING PROGRAM WAIVER AND SUSPENSION

COMMENTERS

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COMMENTS

- (1) Comment: The commenter recommends that the Department reference the applicable chapter rather than re-defining terms that occur in Chapter 156 or elsewhere in the Department's regulations. (1)

Response: Generally, when a term occurs in more than one of the Department's regulations, that term is defined in Chapter 100. Because Chapters 156 and 157 present the unusual situation of two rules addressing different aspects of the same program and because Chapter 157 has so few terms that require defining, for the convenience of those reading and using these rules, the Department has chosen to use those terms directly in both rules, rather than in Chapter 100.

- (2) Comment: The process for waiver and suspension of the rules for any source should be used only in extreme events and the process for determining need should be open and transparent.

The rules, as drafted, don't seem to include the requirement for the Commissioner to consult with the Attorney General or the MPUC Chair as required by the statute. (1, 3, 6, 8)

Response: The Department acknowledges this, and has added language to Section 2 incorporating a consultation process with the Attorney General and the Maine Public Utilities Commission.

- (3) Comment: Chapter 157 should limit the time period of the waiver. (1, 3)

Response: The CO2 Budget Trading Program legislation (PL 2007, c.317) prescribes a one year limitation for waivers of enforcement granted by the Commissioner. The Department has added this one-year time limit to Section 1(J).

- (4) The Department should add conditions of transparency and review to the granting of waivers. The rule should include public notice and opportunity for public review. (1, 3, 6, 8)

Response: The Department has added the following language to Section 2 to allow for public comment in the case of requests for waivers that exceed 30 days: "If the time period for the requested waiver of enforcement exceeds 30 days, the Department will issue a notice for a 21-day public comment period to the major newspapers in the state."

- (5) Comment: It is possible that ISO-New England may need to declare an emergency and during such a period require certain CO2 budget units to operate at higher levels than would otherwise be the case. To address this potential situation, electric grid constraints, as determined by ISO-New England, should be added to the list of events for which the Commissioner could, in his/her discretion; suspend the requirements of Chapter 156. (1, 5, 7)

Response: The list of possible emergency situations listed in the definition of "Emergency Event" in Section 1 is not all-inclusive. If an event not specified on this list occurs, the affected CO2 budget unit has the opportunity to demonstrate that it was an emergency in the request for suspension.

- (6) Comment: The Draft Rule should be amended to require that before a suspension is granted, at a minimum, the region must have already triggered the Safety Valve Threshold event, indicating that the regional flexibility and relief mechanisms have been exhausted first. (2)

Response: The safety valve threshold event is a regional mechanism that may or may not reflect an individual CO2 Budget Unit's situation. While a safety valve threshold event could be used as a factor in the Commissioner's determination of whether an emergency occurred, other factors will also be considered. Each event will be judged by the Commissioner on a case-by-case basis. PL 2007, c.317 does not restrict the Commissioner to specific emergency events.

- (7) Comment: The Draft Rule should be amended to allow 90 days for applications that occur more than three months before the end of a compliance period, and keep it at 30 days for applications that occur in the last three months of a compliance period, and interested stakeholders should be given notice and an opportunity to comment. (2)

Response: The rule as drafted does not provide for a specific time-frame for granting waivers and suspensions to allow the Department opportunity for obtaining the necessary information and full opportunity for consultation with necessary parties.

- (8) Comment: The commenter encourages the DEP to reconsider the structure of the proposed regulatory language so that the whole program would be waived or suspended for all CO₂ Budget Sources in Maine and not just for a single CO₂ Budget Source if there are high allowance prices or if issues not under the control of the Budget Source occur. (4)

Response: While such a process may streamline the granting of waivers or suspensions, it is not the process laid out by the legislature, which specified that waivers and suspensions can be granted for individual carbon dioxide budget units, not for the program as a whole. The Commissioner may prospectively suspend a source's compliance obligation if there is an emergency event, or retrospectively waive enforcement for violations if compliance with the trading program would have caused a source immediate and irreparable harm as a direct result of CO₂ allowance prices. The burden of requesting and demonstrating need for a waiver or suspension lies with individual facilities.

- (9) Comment: The commenter urges the Department to add a sunset provision to Chapter 157 to eliminate the program if and when a national greenhouse gas trading program is adopted. (5)

Response: At such time that the Federal Government adopts a national greenhouse gas trading program, the Legislature will make the determination whether or not to repeal Maine's CO₂ Budget Trading Program.